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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ALEJANDRO ZAMORA,<br>Defendant and Appellant. | A152399<br><br>(Solano County<br>Super. Ct. No. FCR317274) |

Appellant Alejandro Zamora was convicted by a jury of one count of sodomy of a child 10 years of age or younger (Pen. Code, § 288.7, subd. (a)),[1] two counts of oral copulation with such a child (§ 288.7, subd. (b)), two counts of continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a)), two counts of unlawful sexual conduct with a minor under the age of 16 (§ 261.5, subd. (d)), and one count of lewd conduct with a 14- or 15-year-old child at least 10 years younger than himself (§ 288, subd. (c)(1)). The victim of all of these offenses was appellant's stepdaughter, referred to in the record and the parties' briefs as "E."

On August 21, 2017, appellant was sentenced to a determinate term of 19 years and 8 months followed by an indeterminate term of 55 years to life. This timely appeal was filed on September 27, 2017.

[1] All statutory references are to the Penal Code.

The sole issue presented is whether the trial court committed reversible error by denying appellant's motion for a mistrial based on the prosecutor's "improper emotional display" during her opening statement to the jury.

## FACTS AND PROCEEDINGS BELOW

### *The Context of the Prosecutor's Presentation to the Jury*

The facts pertinent to the single issue before us are only those necessary to provide the context for the "emotional display" of the district attorney that was the basis of appellant's mistrial motion. Before describing the prosecutor's conduct, it is appropriate to first describe the nature of the sexual offenses charged against appellant, because the unusually egregious nature of those offenses—which commenced when the victim was seven or eight years old and took place hundreds of times until she was 16—was unquestionably the catalyst of the district attorney's emotionalism. The corroborated trial testimony of the victim is alone sufficient to adequately establish the pertinent circumstances; it is unnecessary to relate the testimony of E.'s mother, her boyfriend, numerous other witnesses who participated in the criminal investigation that took place, or the forensic evidence, except as it relates to whether, if the prosecutor's conduct was erroneous, it was also prejudicial.[2] We describe the evidence relevant to prejudice when we later address that legal question.

In 2003, when E. was three years old, her mother began dating appellant, who she married in February 2005. The couple initially lived with E. and her brother in the first apartment in Vacaville. When E. was 11 years old, the family moved to the second apartment, also in Vacaville.

E. testified appellant first abused her was when she was almost eight years old, while her mother was at work. He unwrapped a Hershey's Kiss, rubbed it on his penis,

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[2] Appellant did not testify. However, as we later discuss in detail, after he was arrested and read his *Miranda* rights, appellant initially denied ever engaging in sexual conduct with E. After being told by police officers that his denial conflicted with forensic evidence, appellant allowed that he had engaged in multiple sexual acts with E. only once, on the day of his arrest, but those acts were initiated by her, not him. (See Discussion, *post*.)

grabbed her by her head, pushed her down, and made her "suck and lick it off" him. When appellant's penis entered her mouth she tried to back away, but he prevented her from doing so. E. didn't want to do this, didn't understand what was happening, and was "confused" and "scared." Appellant initiated incidents like this a few weeks later, and over time did so every two to three weeks over a two- to three-month period.

E. feared resisting appellant, or telling others what was happening, because she believed it would anger him and he might respond violently. On some occasions appellant would yell at E. or "throw stuff," hit her with a back scratcher or belt, and "sometimes kicked and punched" her, and she was afraid that would happen again if she said anything to others. E. told her mother what appellant was doing to her "a couple of times," but appellant would "deny it all," when her mother confronted him.

At some point, appellant stopped rubbing chocolate on his penis but told E. she had to suck his penis anyway. This happened every two to three weeks over a three- to four-month period. When these events took place, appellant's penis was erect, and on some occasions something came out of his penis that was "slimy and bitter," and she would spit it out.

E. was not sure exactly when appellant began having anal sex with her, but it was before the family left the first apartment house when she was 11. The first time this took place was in the bathroom. Appellant pulled down her jeans, bent her over the toilet and "started to anally rape" her, which hurt and made her cry. Appellant did not stop until he had ejaculated. Often appellant made E. "suck his penis" before sodomizing her and ejaculated into her mouth. When he did so she spit the semen into the sink and brushed her teeth.

Appellant continued forcing E. to fellate him and then sodomizing her after November 2011, when the family moved into the second apartment house. When he sodomized her, his penis was always erect, and he ejaculated in her anus "at least half the time." The sodomy was painful and she often cried out, and when she did cry out he put his hands on her mouth or "muffled" her cries. During the summer between the eighth and ninth grades, appellant began penetrating her vaginally with his penis regularly,

which was painful. This first happened when they were both in the living room and appellant began stroking her thighs. He then took her to his bedroom, had her undress, took off his own clothes, had her suck his penis, laid her on her back, put her legs over his shoulders, and entered her vagina During intercourse he would say "Oh, do you like it? Tell me you like it." E. testified that she did not like it. E. stated that appellant made her suck his penis "possibly over a hundred times, sodomized her "[t]wenty or thirty" times, put his finger in her vagina "[t]hirty times," and had sexual intercourse with her "[a]t least fifty times."[3]

During the years E. was in high school, appellant would usually engage in forced sexual acts with E. on Mondays and Fridays, because on those days E. got out of school early. Unless appellant was mad at her, this conduct took place "pretty much every week." The sexual conduct usually commenced with forced oral copulation until appellant had an erection and then intercourse. "It would typically end with him pulling out, have me go back to oral until he ejaculated in my mouth." Appellant never ejaculated in her vagina.

E. revealed some of what was happening to her friend Faith B. during her sophomore year in high school. She didn't tell Faith everything, however, because she thought that would "overwhelm" her. Faith corroborated E.'s testimony, but thought the girls discussed appellant's sexual abuse of E. about 10 times during their sophomore year. Faith also told a Vacaville police officer about E's earlier disclosures to her of appellant's sexual abuse.

Earlier, during the summer before her sophomore year, E. began dating S.H., who was a class ahead of her. In August, after they had been dating for more than a year, she revealed to him some of the details of appellant's conduct. As she testified, "It had been

[3] At the time the police arrived in response to her mother's 911 call, E. told Vacaville Police Officer Daniel Torres that appellant had engaged in vaginal intercourse with her about 150 times, and testified on redirect that that was a more accurate estimate; although she also told Officer Torres that it happened "about a thousand times" but admitted she was "not sure."

bothering me, and I just knew that I was at a point where I started to realize that I just can't keep continuing with this. I couldn't keep going on without telling anyone. And I just wanted to tell someone other than my mom because I didn't want her to just confront him straight up and cause problems because she wouldn't have handled it well. After E. described some of what appellant was doing, S.H. wanted fuller disclosure. Because she was too nervous to tell him everything directly and in person, she conveyed the information to him by text. When S.H. learned what appellant had been doing, he became "extremely angry," and began "trying to convince me to tell my mom" or to call him after an incident so that he and her mother could take her to the hospital, presumably to obtain physical evidence of appellant's sexual acts; but E. just "couldn't bring myself to do it." E. also wrote her mother a letter describing all the things appellant had done and "the pain he had put [her] through," but she just "couldn't" deliver it.

Finally, E. decided that the next time appellant abused her she would spit some of his semen into a vial and show it to her mother as proof of his conduct. She did this twice, first shortly before appellant was arrested, and the second time the night of his arrest. On the latter day, before E. showed the vials to her mother, S.H. called E.'s mother and told her she needed to speak to her daughter without appellant present. The mother then went to E. who finally disclosed "the basics" of what was happening between her and appellant. Shocked at hearing this, her mother broke down in tears and called 911. The dispatcher told her to take E. and her brother outside and wait for the police. When the police arrived and interviewed E., who could not stop crying, she told them some of what had happened in the past but she concentrated on recent sexual encounters and told the officers about the semen she had put in vials. One of the officers took E. to a hospital, where she was examined by a sexual assault nurse who collected forensic evidence and took photographs.

***The Prosecutor's Conduct***

At the commencement of the trial the court told the jury that counsel would make opening statements and the purpose of such statements was "to give you an overview of

what the attorneys expect the evidence will show." Among other things, the court instructed jurors that their verdict "must be based only on the evidence presented during trial in this court and the law as I provide it to you," adding that "[y]ou must use only the evidence that is presented in this courtroom. Evidence is the sworn testimony of witnesses, exhibits admitted into evidence, and anything else that I tell you to consider as evidence. The court explained the presumption of innocence and that the prosecution bore the burden of proof to prove appellant's guilt beyond a reasonable doubt. The court also told jurors not to let "bias, sympathy, prejudice, or public opinion influence your decision." The court also gave jurors the standard admonition that "[n]othing the attorneys say is evidence. In their opening statements and [in] their closing arguments, the attorneys will discuss the case; but their remarks are not evidence; their questions are not evidence."

In her opening statement, the district attorney described appellant's sexual abuse of E as it developed over the course of years, and the reasons she felt unable to fully reveal the molestations to others. As she began describing appellant's last two sexual assaults and E.'s spitting appellant's semen into vials to preserve them as proof of his acts, the district attorney appears to have lost her composure, and the following colloquy took place.

MS. JOHNSON [defense counsel]: Your honor, I am going to ask—

THE COURT: Yeah.

MS. JACOBS: I am sorry. I am fine. I can keep going. I am fine. So she spit the semen in the cup and so—

MS. JOHNSON: Your Honor—

THE COURT: Yeah. You know what, we are going to go ahead and take a break. I am going to let the jury step outside.

MS. JACOBS: Your Honor, I am really fine to go on.

THE COURT: We are going to let the jury go ahead and step outside."

After the jury left the courtroom, the court stated that it had been "a long week. I am tired. I know you guys are tired too. But it goes without saying I can't have a prosecutor in tears in front of the jury."

After the district attorney apologized the court stated that it was "going to admonish the jury when they come back in, right, that you got choked up." The district attorney agreed and acceded to the court's observation she should "get some rest" and "this is not going to happen again."

When the court asked defense counsel whether she needed to address anything further, counsel answered "I am asking for a mistrial. [Jurors] can't ignore the fact the prosecutor is crying while giving her opening statement. And it leaves the jury to believe, I think, that the district attorney knows the truth of these accusations; she doesn't. She is presenting her case, and I believe that jurors often believe that we, quote, know the truth about what happened and we don't. We weren't there. And so I am asking for a mistrial. [¶] I don't think there is any admonishment that you can give to this jury that they are going to forget what just happened. Especially now that [E.] is going to be testifying here next. I don't think the bell can be unrung with any admonishment."

The district attorney then asked that the record reflect that "I am obviously emotional, but I am not crying. I do not have tears coming down my face." The court responded, "No, your eyes got red and you did get choked up and your nose is a little red now as well."

When the proceedings resumed and the court allowed defense counsel to make a record for her motion, counsel stated that when the jurors left the courtroom she noticed that one of them had watery eyes and "kind of sighed deeply . . . ," suggesting that the juror may herself have become emotional as a result of the district attorney's conduct. Counsel added that the prosecutor's display of emotion had a "cumulative effect" because she had previously referred to certain witnesses by their first names,[4] indicating "she

[4] Counsel noted that she did not object to this expression of familiarity when it occurred "because it would just draw more attention to it at that point, but, you know, the

knows these people very well and that she knows all about the truth and all about what happened . . . during this case when she doesn't have any firsthand information." Defense counsel did not, however, suggest that the prosecutor had intentionally become emotional. "That is not what I am saying at all," she stated, "but it happened."

The trial court denied the motion for mistrial, stating: "I am going to deny it without prejudice. If you find a case on point that says that that is grounds for mistrial, I will allow you to brief that and bring it back before me." Appellant never renewed the motion.

When the prosecutor expressed hope the court would not admonish jurors, because that would "highlight" her emotionalism, the court responded that "it is already highlighted." The court observed that lawyers, judges, and others "who are in the criminal justice system 24/7" and become familiar with the "gruesome" aspects of child molestation, "grow a thicker skin" and "don't get shocked by it." But the jury in this case "just heard the People's opening statement where she described an 8 year old being anally sodomized by the penis of her stepfather.[5] That is still some pretty shocking stuff to hear for the first time ever. . . . [¶] . . . I am going to give an admonishment, make sure nobody is influenced by Ms. Jacobs. And I am going to be telling them people are tired. It's been a long week. But statements and comments by attorneys and actions by the attorneys are not evidence. They can't be considered by the jurors. Only the witnesses' testimony is evidence." As shown by the remedial admonition given by the court, which is set forth in its entirety in the margin below, this is exactly what the court did.[6]

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reason that she gave for doing that was that they all have the same name [but] that is not true."

[5] As earlier noted, E. testified that she was not certain exactly when appellant began sodomizing her except that it began while she was living in the first apartments, which the family left when she was 11.

[6] As pertinent, the courts admonition was as follows:

"It has been a long week for everybody. I don't know about you guys, but I am tired. Are you tired? I know (JUROR NO. 11) is tired. We already know about that.

## DISCUSSION

We review a trial court's ruling on a motion for mistrial for abuse of discretion. (*People v. Valdez* (2004 32 Cal.4th 73, 128.) " ' " 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. . . .' [Citation.] A motion for a mistrial should be granted when ' " 'a [defendant's] chances of receiving a fair trial have been irreparably damaged.' " ' " [Citation.]' " ' " (*People v. Harris* (2013) 57 Cal.4th 804, 848.)

A defendant claiming misconduct on the part of the prosecutor is not required to show that he or she acted in bad faith. (*People v. Hill* (1998) 17 Cal.4th 800 822-823.) Although the rule at one time required a showing of bad faith, that requirement was set aside by our Supreme Court in *People v. Bolton* (1979) 23 Cal.3d 208, 213-214), and the Supreme Court has since observed "that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent it suggests a prosecutor must act with a culpable state of mind," and "[a] more apt description of the transgression is prosecutorial error." (*Hill,* at p. 823, fn. 1.) A defendant's conviction will not be reversed for prosecutorial misconduct

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"You already kind of observed this through the jury selection process, you know, emotions can run high with these kind of cases; right? But your job as jurors is not to let other people's emotions affect you. Same thing with that instruction about public opinion too. Because your job is to be—did you ever see the TV movie The Bubble Boy? Remember?

"You are way too young, (JUROR NO. 9), to have ever seen that.

"This guy was in a vacuum or bubble because he couldn't have germs or whatever —I don't know. But I kind of have to have an invisible bubble around you. Some days it is harder than others, especially when you are tired, you are hungry, you are in a hurry, remember all those things I have to test myself about?

"Okay. So, you know, you have observed during the jury selection process some people have some emotions. There might be emotions shown during the course of this trial by the people that are involved in it. Anything, though, that what the attorneys say or do is not evidence. That is not evidence. And it is not to be considered by you. Only the witnesses' evidence and testimony and their demeanor can you consider.

or error "unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct" or error. (*People v. Crew* (2003) 31 Cal.4th 822 at p. 839.)

Appellant's argument on appeal is identical to that he advanced at trial: that it was unreasonable and an abuse of discretion for the trial court to conclude that its admonition, or any admonition, was sufficient to cure the prejudice caused by the prosecutor's emotional display. As appellant says in his opening brief, quoting *People v. Ozuna* (1963) 213 Cal.App.2d 338, "it is 'self-deceptive to assume' that the jurors could put the episode out of their minds."

This argument is primarily based on two cases—*People v. Mayfield* (1997) 14 Cal.4th 668 (*Mayfield*) and the opinion of the Illinois Supreme Court in *People v. Dukes* (1957) 12 Ill.2d 334 (*Dukes*)—neither of which are particularly relevant to this case.[7]

*Mayfield* was a death penalty case in which the Supreme Court held, among many other things, that the prosecutor's comments to the jury about the defendant did *not* constitute misconduct. However, the facts of *Mayfield* are so dissimilar from those of the case before us[8] that it is hard to discern what solace appellant finds in the opinion beyond

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[7] *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, brought to our attention by the Attorney General, is the only California case we know of involving an allegation that a prosecutor cried during opening statement. However, as the Attorney General correctly observes, the opinion provides us little guidance. In that case defense counsel interrupted the prosecutor's opening statement and claimed that the tone of her voice indicated she was crying. The prosecutor denied she was crying, or "breaking up." (*Id.* at pp. 859-860.) The Supreme Court found that the "fairest reading of the record" was that the trial court had determined that the prosecutor had not been crying and that, in any event, any claim of error was forfeited by counsel's failure to request an admonition. (*Id.* at pp. 860-861.) However, as the Attorney General also points out, *Daveggio and Michaud* does support the conclusion that a curative admonition can be effective "even where supposedly 'improper inflammatory attacks' are at issue." (*Id.* at pp. 861-862 ["[w]e presume that jurors follow instructions not to be swayed by sympathy or prejudice"].)

[8] The prosecutorial remarks challenged in *Mayfield* were as follows: " 'We have those officers out there to protect us because there are individuals like Dennis Mayfield in our society. . . . But there's some people that have a total, an absolute disregard for our

the italicized words of the boilerplate statement that "[a]lthough *it is misconduct for a prosecutor to make comments calculated to arouse passion or prejudice* [citation], the comments defendant challenges here were not so calculated." (*Mayfield, supra,* 14 Cal.4th at p. 803, italics added.)

In *Dukes* the conduct of the prosecutor went far beyond anything that occurred in the present case. At a trial in which Dukes was convicted of the first degree murder of a police officer, the prosecutor appears to have wept during closing argument, telling jurors he knew the victim personally. The prosecutor also introduced various forms of inadmissible evidence and made statements unrelated to the guilt or innocence of the defendant which he intentionally employed to prejudice the defendant in the eyes of the jury as reasons it should impose the death penalty. For example, evidence that the murdered officer left behind a spouse and child served only to arouse the jurors' passions, and a statement that the defendant had once used an alias, indicating he had reason to conceal his identity, suggested an otherwise inapparent criminal past. In his closing

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laws. Dennis Mayfield is one of those. . . . Unfortunately, we have people like Dennis Mayfield. And because of that we need people like [Detective] Amicone and [Sergeant] Wolfley and all the other officers that came in here, to help us live in this community, in this great state, in this free country that we have. It's free. Yes, it is. Free. We all have our free agency, our ability to choose and decide. And unfortunately, Mr. Mayfield exercised his free agency in a manner that goes contrary to the rules of society. . . . You remember what President John Kennedy said. Ask not what your country can do for you. Ask not what you can do for your country. A lot of people that have given for their country that have made this a free land [*sic*]. He has not given. He has taken. Taken whatever Dennis Mayfield decided that he wanted throughout his entire life.' " (*Mayfield, supra,* 14 Cal.4th at p. 803)

The Supreme Court rejected the defendant's arguments that these statements " 'could have been made only for the purpose of arousing passion and prejudice,' " and urged the jurors not to assess defendant's individual culpability, "but instead to view him as a representative of the criminal element of society." (*Mayfield, supra,* 14 Cal.4th at p. 803.) In the view of the Supreme Court, these comments at issue embodied two theses, "first, that the murder of a peace officer engaged in performing official duties is a particularly aggravated form of murder, and, second, that defendant's life history revealed him to be a person not deserving of sympathy or mercy." (*Ibid.*) The court found that "[b]oth lines of argument are permissible at the penalty phase of a capital case." (*Ibid*.)

argument the prosecutor told the jury that the murdered officer " 'had the right to take the defendant's life' " but didn't because he wanted to leave that job " 'to twelve people like yourselves, to have the courage and guts to do your duty. So, for that reason, that man is here today.' " (*Dukes, supra,* 12 Ill.2d at pp. 341-342.)

No relevant appellate opinion dispositively indicates whether the prosecutor's "emotional display" during her opening statement to the jury constitutes an improper appeal to passion or prejudice that must be deemed prosecutorial error. The "emotional display" was not extravagant. As the trial court pointed out, the prosecutor's eyes got red, she choked up, and her nose also reddened. She did not shed tears and her display of emotion was not just unintended but exceedingly brief.

Appellant's claim that the prosecutor's emotionalism amounted to improper vouching for E's credibility—because it led the jury "to believe that the district attorney knows the truth of [E.'s] accusations"—is unpersuasive. At the time the district attorney reddened and choked up, she was describing E.'s placement of appellant's semen in vials to preserve it as proof of his unlawful sexual acts, facts that were later received in evidence and discussed in E.'s testimony and that of other witnesses. Thus, even indulging the assumption that the prosecutor might have been seen by jurors as vouching for E.'s credibility, jurors likely found the abnormal *facts* the prosecutor was describing more compelling than her emotional state.

Moreover, there is no reason to think jurors did not understand or adhere to the court's admonitions. The instruction was concise and to the point. Jurors were told that in cases such as this "emotions can run high" but "your job as jurors is not to let other people's emotions affect you." The court noted that that jurors "ha[d] observed during the jury selection process [that] some people have some emotions" and allowed that there also "might be emotions shown during the course of this trial by the people that are involved in it," but the court made clear that "what the attorneys say or do is not evidence [and] is not to be considered by you," and jurors can only consider "the witnesses' evidence and testimony and their demeanor."

Finally, even if jurors were as impressed by the prosecutor's emotionalism as appellant claims, and even if it could be considered improper vouching for E.'s credibility, we would still be unable to reverse the judgment. The forensic and testimonial evidence of appellant's guilt of the offenses of which he was convicted, which corroborated E.'s testimony, was so overwhelming that it is inconceivable appellant would have received a more favorable verdict in the absence of the prosecutor's conduct.

Suffice it to note that Faith B. and S.H. both testified that E. told them about the abuse she experienced long before her mother went to the police. S.H. not only testified about his repeated efforts to convince E. to tell her mother about appellant's conduct, but also took "screen shots" of text messages in which he and E. discussed appellant's abuse. Evidence was also received that appellant's DNA was found on E.'s breast, and E.'s DNA was found on a swab taken from appellant's penis and scrotum. Also, the vial E. produced contained semen that matched appellant's DNA profile.

Finally, appellant's statements to the arresting officers were simply unbelievable. Appellant did not testify but his position was communicated to jurors by recordings of postarrest interviews by Officers Torres and McCoy after appellant was read his *Miranda* rights. Initially, appellant denied any sexual contact with E. and stated that he was physically unable to "manage" such sexual acts due to erectile dysfunction. After the police told appellant of E.'s statement that he ejaculated in her mouth and she spit some of his semen into a bottle, and that a test of the semen would show that it matched his DNA, appellant again denied E.'s accusations. When Officer Torres asked why E. would make them up if they weren't true, appellant said she and her boyfriend S.H. were mad at him, and insulted him because he refused to give E. permission to go out with him when she didn't fulfill her "duties" as required by the "rules at home." In a later interrogation, after Officer Torres told appellant (falsely) that his DNA had been tested and matched

traces of semen found in E.'s mouth and the semen she had spit into the vial,[9] appellant said: "I was stupid. I . . . just masturbated myself . . . but I never thought that my daughter would do that to me. I didn't masturbate on her" because "I don't have an erection," and he didn't know how his semen could be found in E.'s mouth.

In a later interrogation, appellant told Officer Donald McCoy that on the day he was arrested E. came home from school, hugged him, and "suddenly . . . grabbed his penis" and put it in her mouth, though he told her to stop. E. then took off her clothes, got on top of appellant and, when she "started to move," his penis got "up a little." E. then took appellant's hand and told him to put it in her vagina. Afterward, E. assertedly got on her knees and masturbated appellant until he "emptied myself in her mouth." According to appellant, this was the only time he engaged in any type of sexual conduct with E. Appellant maintained that the sexual conduct that took place on the day he was arrested was planned by E. and her boyfriend because of their anger at his refusals to let her leave the apartment, and it was "a lot of coincidence that they saved the semen in a . . . container."

At no point during his interrogations by Officers Torres and McCoy did appellant explain why he allowed his admitted sexual conduct with E. to take place.

Given the incredibility of appellant's statements to the police, and the strength of the evidence of his guilt, we certainly cannot say that "it is reasonably probable that a result more favorable to the defendant would have been reached" without the prosecutor's conduct. (*People v. Crew, supra,* 31 Cal.4th at p. 839.)

**DISPOSITION**

For the foregoing reasons, the judgment is affirmed.

[9] However, as earlier noted, a later test of the DNA of the semen E. placed in the vial did match appellant's DNA profile.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

*People v. Zamora* (A152399)